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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/719,389	11/20/2003	Jeffery J. Wright	03269.0032U1	2578
23850	7590	05/11/2010		
Ballard Spahr LLP SUITE 1000 999 PEACHTREE STREET ATLANTA, GA 30309-3915			EXAMINER JUSKA, CHERYL ANN	
			ART UNIT 1786	PAPER NUMBER
			MAIL DATE 05/11/2010	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/719,389

**Applicant(s)**

WRIGHT, JEFFERY J.

**Examiner**

Cheryl Juska

**Art Unit**

1786

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01 March 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 3-8, 21-23, 25-30, 53 and 54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-8, 21-23, 25-30, 53 and 54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Response to Amendment***

1. Applicant's response filed March 1, 2010, has been entered. Claims 2, 9-20, 24, 31-52 are cancelled. Claims 1, 3-8, 21-23, 25-30, 53, and 54 are pending. (Note no actual amendment has been made to the pending claims.)

***Claim Rejections - 35 USC § 103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Claims 1, 3-8, 21-23, 25-30, 53, and 54 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 2002/0134486 issued to Brumbelow et al. as set forth in section 6 of the Non-Final Office Action mailed 12/12/2007.

***Response to Arguments***

4. In response to applicant's arguments presented in the Remarks filed March 1, 2010, the 102 anticipation rejection of the claims as set forth in section 5 of the last Office Action (Non-Final Rejection mailed 09/29/09) has been withdrawn. Specifically, the examiner concedes a misreading of the Brumbelow reference with respect to the phrase "unexpanded collapsed extrusion coated adhesive backing material." Instead of referring to a coating before activation of a blow agent, said phrase refers to a coating after activation of an implosion agent, which aids

in penetration of the adhesive backing material into the primary backing (sections [0033] and [0152]). Hence, said anticipation rejection is withdrawn and the original obviousness rejection is hereby reinstated.

5. In the response filed August 21, 2009, applicant traversed the obviousness of the thickness of the foamed layer in Brumbelow by arguing that the reference fails to teach thickness as a result effective variable (Amendment, 08/21/09, page 8, 1<sup>st</sup> paragraph – paragraph spanning pages 8-9). As such, applicant asserts a skilled artisan would not know to optimize said thickness.

6. This argument is found unpersuasive since the specific reference relied upon need not contain an explicit teaching that thickness is a result effective variable. Rather, it need only be recognized in the general art as such. In this case, it is readily recognized in the art of foams, in general, and in the carpet art, in specific, that an increase in the thickness of a foam layer provides a corresponding increase in cushioning properties. One skilled in the carpet art readily understands the relationship between foam thickness and cushioning properties (e.g., resiliency, impact absorption, etc.). A reference need not explicitly teach such a relationship for the thickness to be a result effective variable.

7. Additionally, one skilled in the art well understands the relationship of foam thickness to other variables, such as cost. As such, a skilled artisan understands one must balance the desired cushioning properties with production costs (i.e., thickness is a result effective variable).

Contrary to applicant's assertion, the examiner was not implying a teaching away from a thickness of greater than 0.075 inches, but rather further illustrating the fact that thickness is a variable which is understood in the art as effecting various other features and/or properties.

Furthermore, finding a balance between cost and cushioning properties is not beyond routine skill in the art. Balancing production costs with performance and/or quality is standard practice for a manufacturer.

8. Applicant also argues that the examiner has not provided any objective reasoning as to why the foam cushion of Brumbelow is necessarily substantially uncrosslinked (Response filed 08/21/09, paragraph spanning pages 9-10). The examiner respectfully disagrees. Specifically, it was clearly stated that Brumbelow fails to teach or suggest process conditions and/or agents to facilitate a crosslinking reaction, type of crosslinking reaction, degree of crosslinking desired, etc. In view of the reference's silence on a crosslinking reaction and in light of the fact that substantial crosslinking of foam compositions conventionally involves crosslinking agents and specific process conditions, it is reasonable to presume that the HBEP foam composition of Brumbelow is "substantially uncrosslinked." (Note that the term "substantially uncrosslinked" does not necessarily exclude a small degree of crosslinking.) However, the burden was properly shifted to applicant to show that that Brumbelow foam, in the absence of a crosslinking agent or crosslinking process conditions, does not meet applicant's limitation of "substantially uncrosslinked." Applicant has not met such burden.

9. Hence, applicant's arguments are found unpersuasive and the above rejection stands.

### ***Conclusion***

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm. If attempts to reach the

examiner by telephone are unsuccessful, the examiner can be emailed at [cheryl.juska@uspto.gov](mailto:cheryl.juska@uspto.gov) or the examiner's supervisor, D. Lawrence Tarazano can be reached at 571-272-1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*/Cheryl Juska/*  
Primary Examiner  
Art Unit 1786